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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 353

HAROLD CHRISTOFFEL and ALLIS-CHALMERS WORKERS UNION, Local No. 248, UNITED AUTOMOBILE WORKERS OF AMERICA, CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Petitioners,

vs.

THE WISCONSIN EMPLOYMENT RELATIONS BOARD and NICHOLAS IMP and MICHAEL BOHACHEF,

Respondents.

BRIEF OF RESPONDENTS NICHOLAS IMP AND MICHAEL BOHACHEF OPPOSING THE GRANTING OF A WRIT OF CERTIORARI

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NATURE OF PROCEEDING AND DECISION BELOW

This brief is filed in opposition to a petition of the above named petitioners for the issuance by this court of a writ of certiorari to review a decision of the Supreme Court of Wisconsin (243 Wis. 332; 10 N. W. 2d 197; Abridgment of Record, last 26 pages following Index), rendered June 16, 1943. This decision affirmed a decision of the circuit court of Milwaukee County, Wisconsin

(Abridgment, p. 137, et seq.), which sustained, confirmed and enforced a decision of the Wisconsin Employment Relations Board (Abridgment, p. 125, et seq.), which Board was established and functioned herein under the provisions of the Wisconsin Employment Peace Act, Chapter 111, Wisconsin statutes, hereinafter called the state Act.

The above individual respondents filed a complaint under said Act with said Board, charging the petitioners with certain acts of intimidation and coercion against them to compel them to join the petitioning union (contrary to sec. 111.06 (2) (a), Wis. stats.), and against Allis-Chalmers Manufacturing Company, hereinafter called the employer, to compel their discharge (contrary to sec. 111.06 (2) (b), Wis. stats.), and asked the issuance by the Board of an appropriate cease and desist order under the state Act against the petitioners. The complaint also charged a violation of sec. 111.06 (2) (e), Wis. stats. The Board found that this charge was not sustained and thereafter this charge dropped out of the case. (*Christoffel vs. Wisconsin Employment Relations Board*, 10 N. W. 2d 197, 199.)

A hearing on the merits was duly had, findings made by the Board sustaining the first two above charges and the petitioners were accordingly ordered to cease and desist from attempts at coercion or intimidation of the individual respondents and from attempting to coerce, intimidate or induce the employer to interfere with the rights of the individual respondents as employes. The order also contained the usual provisions as to posting of notices by the Union and as to notification of the Board of compliance with the order.

The petitioners commenced the action provided in the state Act in the Milwaukee County circuit court to review and set aside this order and the respondent Board cross-

complained, asking its enforcement. From a judgment entered affirming the order the petitioners appealed to the supreme court of Wisconsin, which affirmed the judgment. This decision of the latter court is now sought to be reviewed here on certiorari.

PETITIONERS' ALLEGED JURISDICTIONAL GROUNDS FOR REVIEW

Petitioners seek to bring the case to this court on the ground that it involves a justiciable controversy under sec. 237 (b) of the Act of Congress dated February 13, 1935 (28 U. S. C. A. 344 (b)), providing among other things that this court may review by certiorari the decision of the highest court of any state wherein there is drawn in question the validity of a statute of such state on the ground of its being repugnant to the Constitution or laws of the United States.

Petitioners assert as the reason for allowance of the writ that the foregoing decision of the supreme court of Wisconsin has decided a federal question in a way in conflict with an applicable federal statute and applicable decisions of this court. (Pet. Br. p. 8.)

The federal questions asserted by their brief to be presented by the foregoing decision may be synopsized as follows:

> 1. Whether Wisconsin may, by its Employment Peace Act, create a right to abstain from all of the concerted activities provided for by the National Labor Relations Act (hereinafter referred to as the national Act), and by interpretation of such right prevent the exercise of rights guaranteed in section 7 of the national Act.
>
> 2. Whether Wisconsin by its said state Act may prevent a duly authorized labor representative of

employes of an employer engaged in interstate commerce from obtaining a closed shop by demanding that the employer discharge employes who refuse to join such labor union.

3. Whether Wisconsin may prevent membership solicitation by members of such union because such solicitation encroaches upon a right granted by the state statute to refrain from collective labor activities. (Pet. Br. p. 8)

The position of the individual respondents is that the writ should not issue because it clearly appears that no substantial federal question is presented, and the objections raised are determined against petitioners by applicable decisions of this court.

Specifically as to the three foregoing alleged federal questions set forth by petitioners the individual respondents feel that such questions as stated present a misleading idea as to the *real* issues. These respondents' position as to petitioners' so-called "issues" may be stated in extremely condensed form as follows:

1. There is no conflict between the state and the national Act in the respect suggested. While sec. 111.04, Wisconsin Statutes, after using language practically identical with that of the national Act as to employes' right of association, adds the right of the individual employe "to refrain from any and all such activities" this language, as it reads and as interpreted and applied in the decision sought to be reviewed in no respect conflicts with anything in the national Act.

2. The order complained of, as interpreted by the supreme court of Wisconsin, merely forbade (1) attempts to intimidate and coerce the individual respondents and (2) attempts to intimidate and coerce the employer, including demands, *in the absence of*

any closed shop contract, that it discharge these respondents because they would not join the petitioning union. Such an order does not run counter to anything in the national Act.

3. Neither the order of the Board, the judgment of the circuit court nor the decision of the supreme court of Wisconsin forbade "solicitation" of the individual respondents to accept union membership. What was forbidden was "continuous solicitation if objected to." Read in the light of the evidence and findings, this was constant persistent solicitation over repeated objections in an atmosphere of intimidation and coercion.

It is therefore the position of these respondents not only that there is no substantial federal question involved, but also that each of the alleged federal questions set forth by petitioners is frivolous and devoid of merit.

CORRECTIONS TO PETITIONERS' "SUMMARY STATEMENT OF MATTERS INVOLVED."

(Pet. Br. p. 2, et seq.)

The "Summary Statement of Matters Involved" beginning on page 2 of the Petition for Writ of Certiorari, constitutes a fair statement of the case with one principal exception.

The evidence as to whether the complainants before the Labor Board, Imp and Bohachef, were still members of Local 248 at the time of the occurrences found by the Board, can hardly be said to be in dispute. The evidence is clear and unmistakable that except for a few weeks prior to November, 1940, they were members in good standing of another union, i.e., Local 66 of the Machinists Union, A. F. of L. As they had ceased paying dues to Local 248 in May of 1939 and joined the A. F. of

L. union in October or November, 1940, it is difficult to find any basis for a dispute on the proposition that they were not members of Local 248 at the times involved in the controversy. (Abridgment, p. 152, 158.)

Also, the reference by counsel to the incident of December 18, 1940, in which the complainants were accused of attempting to "run down and injure" one of the members of Local 248, is misleading. The Board described in its findings (Abridgment, p. 129) the true facts of this matter; and held the accusations of petitioners as to running down anyone to be false and without any substantial basis. (Abridgment, p. 132.)

ARGUMENT

Petitioners' brief attempts to present a basis for exercise by this court of its discretion to review the decision of the supreme court of Wisconsin by an argument which contains misstatements, omissions of vital matters and many wholly unwarranted inferences. In the interests of brevity, no attempt will be made to note and answer these in detail, but some of them will be referred to in the course of the argument.

Petitioners' brief (pp. 14-15) sets forth seven points in respect to which it is asserted that the state court erred. These alleged errors will be covered in the course of this argument. The sixth error alleged, referring to interstate commerce, can be disregarded, since it is apparent from a reading of the decision that it does not rest on any finding that interstate commerce was not involved or affected.

I. *Section 111.04, Wisconsin statutes, is not repugnant to section 7 or to any other portion of the National Labor Relations Act.*

Section 111.04, Wisconsin statutes, at which petitioners' attack is mainly levelled, reads as follows:

> "Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

As stated in the opinion of the supreme court of Wisconsin (*Christoffel vs. Wisconsin Employment Relations Board,* (Wis.) 10 N. W. 2d 197, 200) this section is practically identical in its wording with section 7 of the national Act (29 U. S. C. A. sec. 157), but adds at the end thereof the phrase "and such employes shall also have the right to refrain from any or all of such activities."

The major part of the petitioners' brief is based upon the entirely unwarranted assumption that these words create a conflict between this section of the state Act and section 7 of the national Act. That is equivalent to saying that the right to "refrain" from the specified activities exists under the state Act, but does not exist under the national Act.

Of course, nothing of this sort is true. The right to refrain from these activities is nowhere *denied* by the national Act. It is specifically stated to be a part of the national public policy in the Norris-La Guardia Act (29 U. S. C. A. sec. 102). There the Congress, after reciting that the employe did not possess equality of bargaining power with the employer, says:

> "wherefore, *though he should be free to decline to associate with his fellows,* it is necessary that he have full freedom of association, self-organization and designation of representatives," etc.

Repeatedly in petitioners' brief the statement appears in one form or another that the right to refrain expressed in this section of the state Act is repugnant to the right of organization expressed in the national Act. (Pet. Br. pp. 14, 16-19) The foregoing statement of policy in the Norris-La Guardia Act shows how unsound such a position is.

The national Act contemplates that the employe shall have this freedom of choice, although, unlike the Wisconsin Act, it is silent upon the subject. However, when the national Act assures to each employe the "*right* to self-organization, to * * * join * * * labor organizations, to bargain collectively * * * and to engage in concerted activities" there is of necessity implied in the very grant full freedom on the part of each such employee *to exercise such rights or not,* as he elects.

This was well stated by the circuit court of appeals (7th circuit) in a case in which certiorari was denied by this court.

> "Nor does the Act compel an employe to form, join or assist a labor union, and he may deal individually with the employer. National Labor Relations Board vs. Sterling Electric Motors, 9 Cir., 109 F. 2d 194, 202." (*National Labor Relations Bd. vs. Superior Tanning Co.*, 117 F. 2d 881, 890; cert. denied, 313 U. S. 559, 61 S. Ct. 834, 85 L. ed. 1520.)

Other federal decisions supporting this interpretation of the national Act include—

Magnolia Petroleum Co. vs. National Labor Relations Board (10th Cir.), 115 F. 2d 1007, 1012;

National Labor Relations Board vs. Sterling Electric Motors (9th Cir.), 109 F. 2d 194, 202 (Opinion on rehearing 112 F. 2d 63; set aside on other grounds, 114 F. 2d 738, motion denied 311 U. S. 617, 61 S. Ct. 67, 85 L. ed. . . .; certiorari dismissed 311 U. S. 722, 61 S. Ct. 69, 85 L. ed. 471.)

Tri-plex Shoe Co. vs. Cantor, 25 F. Supp. 996, 997.

Petitioners' brief (p. 16, et seq.) asserts that the inclusion by the state Act of a number of acts constituting unfair labor practices when committed by employes or third persons (sec. 111.06 (2) (a) to (j) and 110.06 (3)), a subject on which the national Act is silent, brings the two acts into conflict.

The situation is not one where the silence of Congress can be taken as an indication that the subject should remain free from legislative restrictions or impositions upon it by the several states. Instead, the field is one in which the state is vitally interested locally in the exercise of its police power. The right of Wisconsin to legislate in this very field has been expressly recognized by this court.

> *Hotel and Restaurant Employes' International Alliance vs. Wisconsin Employment Relations Board, et al.*, 315 U. S. 437, 62 S. Ct. 706, 86 L. ed. 946, 950.
>
> *Allen-Bradley Local vs. Wisconsin Employment Relations Board, et al*, 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154, 1164-1165.

This disposes of petitioners' argument that the state has no right to legislate in this portion of this field as to which the national Act is silent.

A bitter attack is made upon the whole state Act as "intended to check the progress of labor organizations and collective bargaining by preventing vigorous activity and persuasion by labor organizations" and as a "subtle attempt to secure industrial peace by retarding or preventing organization." (Pet. Br. pp. 17 and 19)

This is neither the time nor place for a detailed defense against any general attack upon the state Act. As this court has said, it will deal in any case only with the

specific provisions of this Act directly involved in the case before the court. (*Allen-Bradley Local vs. Wisconsin Employment Relations Board, et al, supra.*)

Suffice it to say that the Wisconsin Act represents an earnest attempt by the state, keeping within its legislative field, to contribute to the solution of the problems involved in labor and industrial unrest. The Act is expressly based upon the legislative finding that there are *three* interests involved in any serious labor dispute,—that of the employes, whether represented by a union or not, that of the employer and that of the public; that "these three interests are to a considerable extent interrelated"; and that "it is the policy of the state to protect and promote each with due regard to the situation and the rights of the others." (Sec. 111.01 (1), Wis. stats.) It is likewise recognized that the employe in his negotiations with his employer, whether conducted in association with other employes or not, should be free from "intimidation or coercion from *any* source." (Sec. 111.01 (3), Wis. stats.)

With such an objective it was both inevitable and vital that the state Act should contain guaranties assuring the employe the full and free exercise of these rights (Sec. 111.04, Wis. stats.) and protecting him as fully from interference therein by other employes (Sec. 111.06 (2), Wis. stats.) or third persons (Sec. 111.06 (3), Wis. stats.) on the one hand as it protects him from interference by the employer on the other. (Sec. 111.06 (1), Wis. stats.) Thus here, as throughout the state Act, there is an earnest effort fairly to balance rights, duties and obligations to the end that industrial peace may be achieved and maintained.

II. *Petitioners' contentions that the applicable provisions of the state Act have been so interpreted and applied in this case as to bring them into conflict with the*

national Act and the free speech guaranty of the federal constitution are frivolous and present no substantial federal question.

Disregarding the customary provisions for posting notices and for notifying the state Board of petitioners' obedience of its order, there are only two provisions of that order, as upheld by the state courts in the judgment herein which are before us. They are quoted by the state supreme court in the margin of its decision (*Christoffel vs. Wisconsin Employment Relations Board,* 10 N. W. 2d 197, 203) and are repeated here for convenience.

Petitioners are to "cease and desist from—

> (1) A. Attempting to coerce or intimidate any of the employees of the Allis-Chalmers Manufacturing Company, including Michael Bohachef and Nicholas Imp, or either of them, either by continuous solicitation of membership if objected to, or by assaults, or by threats of bodily harm or of loss of their jobs, or by false accusations of the commission of criminal offenses, or by any other manner or in any other way, to enjoy or engage in, or refrain from, any or all of the following rights or activities: To freely select collective bargaining representatives of their own choosing, or to form, join or assist labor organizations, or to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.
>
> (1) B. Attempting in any way or in any manner to coerce, intimidate or induce the Allis-Chalmers Manufacturing Company to interfere with the complainants, Bohachef and Imp, in the enjoyment, or exercise, of their said rights and activities above stated, or their right to refrain from any or all of such activities."

a. *The first paragraph of the judgment. Prohibition of attempts at coercion and intimidation of employes, including the individual respondents, respecting their rights under sec. 111.04, Wis. stats.*

In challenging this provision of the judgment, petitioners assert that labor unions, in endeavoring to "obtain the fullest enjoyment of their rights under that (national) Act * * * will commit inevitably the new so-called unfair labor practices created by the state Act," and add "This case demonstrates just that."

We agree that the evidence and findings in this case demonstrate how far petitioners will go to coerce and intimidate their fellow employes by acts of violence and coercion denounced as unfair labor practices by sec. 111.06 (2) of the state Act. But most assuredly the success of the great labor movement in Wisconsin neither justifies nor requires nor rests upon such conduct.

The findings of fact of the Board are not and in fact could not be challenged on this petition, particularly as they have been fully approved by the state court after a careful "perusal of the proceedings before the state board." (*Christoffel vs. Wisconsin Employment Relations Board,* 10 N. W. 2d 197, 202.) Hence the findings as to petitioners' course of intimidation and coercion stand as verities.

Nor is there any basis for claiming that the coercion and intimidation found consisted merely of what petitioners' brief denominates "trivial incidents." The evidence and findings show the existence and execution of a carefully planned campaign to intimidate and coerce the individual respondents to the end that they would either be forced to join the union or would forfeit their jobs through forced discharge by the employer.

This campaign of petitioners goes far beyond "solicitation" (Pet. Br. p. 8), "use of persuasion" and "insignificant infringement" of individual rights (Pet. Br. p. 24). It is unnecessary in this brief to discuss the cases cited at pages 25-26 of petitioners' brief to support their

contention. Taking these cases at petitioners' own evaluation of them, they are obviously distinguishable from the present situation where neither the object sought nor the means employed by the union was legitimate. The object here was either, by coercion and intimidation, to force union membership against the will of these employes or to compel their discharge by their employer *when there was no closed shop agreement in existence.* (Finding 4, Abridgment, p. 126) And the methods were the bald acts of intimidation and coercion described in detail in the findings. As the court will read the findings, these acts need not be elaborated here.

There is nothing in this judgment or in the state Act which provides, expressly or even inferentially, that the union "may not demand a closed shop, * * * may not carry on a campaign to obtain it, * * * may not (with certain limitations not involved here) induce the employer to grant it * * *." (Pet. Br. p. 22) All of these things the union may freely do under the state Act and under the judgment. But it may not, as a part of such campaign, coerce, intimidate, hound and persecute, as it did in their campaign in this case.

The assertion that this portion of the judgment infringes petitioners' constitutional right of free speech is equally untenable. There is no denial of the right of a union to *solicit* membership, as the petition charges (Pet. Br. p. 8). What the order forbids is coercion and intimidation by "continuous solicitation of membership if objected to." Reading this, as we must in the light of the background presented by this record and findings, it appears that these individual respondents had been hounded and pursued and subjected to an organized campaign of intimidation and persecution. In view of what had already occurred, the order might well have forbidden *all* further solicitation of these men who had

consistently refused to become union members. (*Milk Wagon Drivers vs. Meadowmoor Dairies,* 312 U. S. 387, 61 S. Ct. 552, 85 L. ed. 836, 840, et seq.) The carefully circumscribed language used in the order was amply justified. Freedom of speech under the constitution and the decisions of this court does not operate as a shield to those who indulge in a planned course of conduct of this type. (*Hotel and Restaurant Employes International Alliance vs. Wisconsin Employment Relations Board, et al,* 315 U. S. 437, 62 S. Ct. 706, 86 L. ed. 946, 950; *Thornhill vs. Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093, 1103; *Milk Wagon Drivers Union vs. Meadowmoor Dairies,* 312 U. S. 287, 61 S. Ct. 552, 85 L. ed. 836, et seq.)

The state supreme court, just as it did in its decision in the case of *Hotel and Restaurant Employes International Alliance vs. Wisconsin Employment Relations Board,* 236 Wis. 329, 352, 294 N. W. 632, 295 N. W. 634, in applying these provisions of the state Act to the situation before it, has carefully followed both the express mandate of the state statute that nothing in it "shall be so construed as to invade unlawfully the right to freedom of speech" (sec. 111.15, Wis. stats.) and the applicable decisions of this court defining that constitutional guaranty as it applies in the field of employment relations.

b. *The second paragraph of the judgment. Prohibition of attempts to coerce, intimidate or induce the employer to interfere with the individual respondents in the exercise of their rights specified in the first paragraph of the judgment.*

The provisions of the second paragraph of the judgment must be read and considered in connection with the first paragraph and in the light of the factual situation which made necessary and justified the provisions of that section.

There was no closed shop contract in effect between the employer and the petitioner union. (Finding 4, Abridgment p. 126) Despite this fact the union, as a part of its campaign to compel the individual respondents to join it against their will, repeatedly demanded of the employer that it discharge them on the ground that they were "disrupters." (Finding 10, Abridgment p. 131) Neither Nicholas Imp (Finding 11, Abridgment p. 131) nor Michael Bohachef (Finding 12, Abridgment pp. 131-132) had ever engaged in any disruptive activities.

The petitioners contend that this paragraph of the judgment illegally circumscribes them in their right and efforts to obtain a closed shop contract with the employer. (Pet. Br. p. 22)

The proposition involved may be baldly stated as follows:

If this employer on its own initiative and in the absence of a closed shop contract, had sought to compel these individual defendants to join a particular labor union by threats of discharge if they refused, it would, under both the national (29 U. S. C. A. sec. 158 (1) and (3)) and the state (sec. 111.06 (1) (a) and (c)) Acts, have been guilty of an unfair practice of the most flagrant sort. (*National Labor Relations Board vs. Jones and Laughlin S. Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893, 916; *National Labor Relations Board vs. Fansteel Metal Corp.*, 306 U. S. 240, 59 S. Ct. 490, 83 L. ed. 627, 634. And see *Hazel-Atlas Glass Co. vs. National Labor Relations Board* (4th Cir.), 127 F. 2d 109, 113-114, where two rival unions were involved and the employer encouraged membership in one and discouraged membership in the other.) Yet petitioners here urge upon this court that it is perfectly legitimate for the union to demand and for the employer to grant the discharge of these men for this reason. It requires nothing beyond the mere statement to show that

an employer cannot do at the union's demand acts of this sort which it is expressly prohibited by law from doing on its own initiative.

If it would constitute an unfair labor practice for the employer, at the insistence of the union in the absence of a closed shop agreement, to threaten an employe with discharge in order to force him against his will to join such union, it is certainly within the province of a state by appropriate statutory provision and of a state court pursuant to such a statute to forbid such union activity.

Petitioners make a persistent effort to challenge in this case the legality of that portion of sec. 111.06 (1) (c), Wis. stats., specifying the conditions under which the making of an all union or closed shop agreement shall not be deemed interference with the employe's rights. (Pet. Br. p. 20, et seq.) They even go so far as to state that the state board and the court based their action on the absence of the three-fourths vote in favor of such an agreement specified in this portion of that statute as the prerequisite of such a contract. (Pet. Br. pp. 21-22.)

This effort of petitioners seeks to bring before this court an issue *never passed upon by the state board, the circuit court or the supreme court.* This provision of that statute was never before nor considered by any one of these tribunals in this action. Petitioners' brief nowhere cites any portion of the record showing that any such consideration was given this portion of this section. Nor can it be claimed that the decision below in any way *in effect* applies to or rests upon this provision of the state Act.

Under these circumstances, this court, pursuant to its settled practice, expressed with reference to this very state Act, will not consider the challenged provision in this proceeding. (*Allen-Bradley Local vs. Wisconsin Em-*

ployment Relations Board, et al, 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154, 1165.) This court has repeatedly applied this same limitation of its jurisdiction in cases in other than the labor relations field. As late illustrations, see—

McGoldrick vs. Compagnie Generale Transatlantique, 309 U. S. 430, 60 S. Ct. 670, 84 L. ed. 849, 851, and

International Steel and Iron Co. vs. National Surety Co., 297 U. S. 657, 56 S. Ct. 619, 80 L. ed. 961, 965.

CONCLUSION

These respondents urge that the petition for certiorari must be denied because it affirmatively appears—

1. That no substantial federal question is presented respecting either of petitioners' challenges, namely—

   a. The alleged repugnance of the specified state statutes as applied in this case to the provisions of the national labor Act; and

   b. The alleged impairment by such statutes as thus applied of the constitutional guaranty of freedom of speech.

2. The objections raised by petitioners to the state Act and its enforcement in this case are fully met and determined against petitioners by applicable decisions of this court.

Respectfully submitted,

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